FILE COPY

IN THE

Supreme Court of the United States

October Term, 1941

THE CITY OF INDIANAPOLIS, et al., *Petitioners*, *v.* THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents.*	Nos. 10 and 11.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Petitioner*, *v.* CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	Nos. 12 and 13.

REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

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REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM.

The City of Indianapolis and the individual members of its Boards of Trustees and Directors for Utilities, petitioners and cross-respondents, respectfully ask permission of the

Court to file the supplemental memorandum attached to this motion.

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM OF CITY OF INDIANAPOLIS, ET AL., PETITIONERS.

NOTE: This memorandum is intended merely to supplement the briefs heretofore filed by petitioners in this cause and all propositions advanced in our original briefs are still relied upon.

I.

FACTUAL SUMMARY.

Citizens Gas Company on August 25, 1905, by a franchise contract with the City of Indianapolis became the initial trustee of a public charitable trust (I R. 81-116), the corpus of which now consists of certain personal and real property utilized in the manufacture and distribution of artificial gas.

Todd v. Citizens Gas Company, 46 F. (2d) 855.

On September 9, 1935, the City, in accordance with its franchise contract with Citizens Gas, took over the trust res, as successor trustee of the public charitable trust.

On September 30, 1913, Indianapolis Gas Company, lessor, and Citizens Gas, lessee, executed the 99 year lease in question here.

When the City became successor trustee on September 9, 1935, it rejected an attempted assignment of the 99 year lease. (Exhibit G to complaint, I R. 130; II R. 468; II R. 423, 463; III R. 965.)

The rejection was ratified by an ordinance of the Common Council of the City. (III R. 1017, offered II R. 439.)

The property of the Indianapolis Gas Company was not a part of the trust res; indeed, the public charitable trust in the property of Citizens Gas Company was created for the very purpose of furnishing and maintaining competition with Indianapolis Gas.

This suit was instituted by Chase National Bank, trustee, under a mortgage of Indianapolis Gas, to enforce the lease against the City.

II.

LEASE WHEN EXECUTED WAS NOT BINDING ON CITY.

The facts in this case show conclusively that the 99 year lease was not, when executed, the obligation of or binding upon the City in any sense. Not only is this statement demonstrably true, but it is strongly, though inferentially, admitted by Chase. The theory of the complaint is that the City is *estopped* to deny the enforceability of the lease and that the City is bound by the principle of *res adjudicata*. *This theory necessarily implies that the lease was initially unenforceable against the City.*

The facts which show indisputably that the lease when executed did not bind the City are:

1. No part of the property of Indianapolis Gas and no [illegible] any part of that property was a part of the trust res. [illegible] one of the underlying purposes of the organization of Citizens Gas was to provide a competitor for Indianapolis Gas.

2. The Trust instruments contain no authorization to lease or acquire the property of a competitor. (Finding No. 2, III R. 1167.)

3. The City did not sign or execute the lease of September 30, 1913. *The only parties to the lease are the lessor, Indianapolis Gas, and the lessee, Citizens Gas.* (Finding No. 22, III R. 1167, 1168.)

4. The City is not named as a party obligated by the lease. (Finding No. 25, III R. 1171.)

5. The City is not an assignee of the lease. An assignment was tendered and rejected. The evidence shows that this assignment was made in a separate written instrument (Finding No. 28, III R. 1171), because the City had advised Citizens Gas prior to September 9, 1935, the date of the transfer to the City as successor trustee, that it would not accept an assignment of the lease. (II R. 464.)

6. No ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, or ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. (City Stip. X 1, 2, 3, 4, III R. 982, 986, offered II R. 424, 425.) (Findings No. 26 and 27, III R. 1171.)

The action of the Board of Directors of the Department of Utilities of the City rejecting the lease was ratified by an ordinance of the Common Council of the City. (III R. 1017, 1018, offered II R. 429.)

7. The City has not accepted a part of a trust res and refused to accept another part. *It has accepted the entire trust res* (Finding No. 22, III R. 1167, 1168) *and rejected a lease which it claims the initial trustee had no power to impose upon the City.*

III.

NO SUBSEQUENT ACTION OF MUNICIPAL AUTHORITY COULD RATIFY OR VALIDATE THE LEASE, WHICH INITIALLY DID NOT BIND THE CITY.

The lease between Indianapolis Gas and Citizens Gas

was for a term of 99 years. The applicable Indiana statutes prohibit the making of such a contract for furnishing gas and other utility services to the City for a term longer than twenty-five years. *Even a lease for a twenty-five year term must first be agreed to by the Board of Public Works and then approved by an ordinance of the Common Council of the City. There is no claim of such approval.*

> Chapter 129, Acts Indiana General Assembly 1905, Sections 85 (Pg. 271) and 254 (Pg. 396) (Burns' Indiana Statutes Annotated, 1933, Sections 48-1705 and 48-7302, respectively.) [1]

A contract for utility services for a term longer than that permitted by statute is void in Indiana and cannot be ratified by any *subsequent* municipal action.

> *Gas, Light & Electric Company v. City of New Albany* (1901), 156 Ind. 406, 415.

At the time the lease was made in 1913 Indianapolis Gas, through its artificial gas producing and distributing facilities, was supplying gas to more than 41,000 consumers in Indianapolis. Its property was twice the size of Citizens Gas. (II R. 621, offered II R. 327.)

When operations commenced under the lease, it was the medium of an agreement to supply gas to 41,000 consumers (or such as continued to take gas) for a term of nearly four times the maximum statutory term permitted for such contracts.

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[1] The relevant portions of Sections 85 (pg. 271) and 254 (pg. 396), Acts 1905, are set out as appendices A and B, respectively, at the end of this memorandum.

The 99 year lease was within the terms of Sections 85 and 254, Acts 1905, because it was a contract for supplying the City and its inhabitants with gas, heat and light.

The lease was not authorized or approved by the Board of Public Works or by any ordinance of the Common Council (III R. 982, 983, offered II R. 424).

The City in its operation of the utility is not responsible to the state Public Service Commission as to rates or fair return.

> Chapter 190, Acts Indiana General Assembly, 1933. (Pg. 928.)

The only check upon rates in such cases is public opinion.

Both Sections 85 and 254, Acts of 1905, serve as a protective shield against unreasonable leases which might well result in the imposition of excessive rates for service, by limiting the duration of such leases and *requiring municipal approval of their terms.*

It is well settled law in Indiana that a contract or lease by which it is sought to bind a municipal corporation, which has been made in violation of the terms of an Indiana statute is absolutely void and cannot be ratified. The doctrine of estoppel has no applicability to such a situation.

> *Gaslight, etc., Co. v. City of New Albany* (1901), 156 Ind. 406, 415;
>
> *City of Indianapolis v. Wann, Receiver* (1895), 144 Ind. 175, 187;
>
> *Hamer v. City of Huntington* (1939), 215 Ind. 594, 600, 601.

In the case first cited, the Supreme Court of Indiana used the following apposite language.

> "It is elementary that municipal officers have no powers beyond those expressly conferred by statute, or necessarily implied to enable them to make effective the powers granted or to protect the public welfare. Therefore, when they attempt an act that is beyond the limit of their power, the act has no official sanction and is no more effectual than if performed by non-official persons. *As a municipal act it is wholly void and being void, nothing of substance may flow from it* * * *' 'Where a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years or for an indefinite time cannot be sustained for ten years but is entirely void * * *'" (Our emphasis.)

If then, as we submit, the lease when executed was unenforceable against the City and could not have been enforced against it for complete lack of municipal authorization, as well as complete lack of intention on the part of the contracting parties to bind any one but themselves, *then it follows that it cannot be made binding on the City by indirection either on the theory that there was implied power to execute the lease or on the doctrine of estoppel. The absolute prohibition of the statute based upon the soundest consideration of public policy cannot be circumvented in any manner. Formal municipal approval of such a lease is an absolute condition precedent to its validity.*

IV.

STATUTES UNDER WHICH CITY TOOK OVER PROPERTY OF CITIZENS GAS DID NOT REQUIRE CITY TO ACCEPT INDIANAPOLIS GAS LEASE.

It has been argued by our opponents that the Acts of the Indiana General Assembly of 1929 and 1931, pursuant

to which the Department of Utilities of the City was created and authorized to take over utility property, mandatorily required the City to accept the Indianapolis gas lease.

But a mere reading of the applicable statutes discloses that they are permissive in character and give authority to accept property or leases without the slightest indication of legislative intent that the City shall be *required* to do so.

Section 1 of Chapter 78, Acts Indiana General Assembly, 1929, provided that in cases such as here:

> "Said municipal corporation *shall be authorized to accept*, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property." (Our emphasis.)
>
> (Burns' Indiana Statutes Annotated, 1933, Sec. 48-7218.)

By Chapter 77 of the Acts of the Indiana General Assembly 1929 (Pg. 252) (as amended by Chapter 67, Acts 1931, Pg. 152) a new and additional executive department was created in Indiana cities of the first class, of which Indianapolis is the only one. This is the Department of Utilities, governed by a board of directors for utilities, and which has

> "the exclusive government, management, regulation and control of all public utilities consisting of any . . . . gas works . . . including any public utility and all property thereof which such city may now or

hereafter hold as trustee for the benefit of the inhabitants of such city . . ."

Section 2, Chapter 67, Acts 1931, pg. 152.

This same section also provides in part that:

"In connection with the duties devolving upon such board of directors in the government, management, regulation, control and operation of all such utilities, or any thereof, it *shall have power* as follows:

. . . . .

"To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, either in absolute ownership or in trust, and take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property." (Our emphasis.)

The statutory phrases "Shall be authorized to accept" and "Shall have power" connote only the right to accept such a lease, and are wholly removed from any concept of compulsion.

At the time these statutes were enacted, Citizens Gas

had a favorable lease on portions of the Majestic Building (P. Stip. X 56 III R. 835 offered II R 327), as well as the lease from Indianapolis Gas. The obvious purpose of the legislation was to permit the City to accept desirable leases, not to foist on it burdensome ones. This entire situation was one of which there was widespread public knowledge and it is indeed strange that the legislature, if it intended to require the City to assume the obligations of the 99 year lease, did not find apt language to express such intention. No amount of statutory construction can fairly lead to the conclusion contended for by Chase.

It is clear that the board of directors were not obligated to take over the 99 year lease at the time the City became successor trustee of the public charitable trust. The Board rejected the attempted assignment of the lease, as it had the right to do. (I R. 130; II R. 423, 463, 468.)

V.

DECISION OF CIRCUIT COURT OF APPEALS BASED UPON IMPLIED POWER OF TRUSTEE IS ERRONEOUS.

As we have heretofore shown, the 99 year lease was unenforceable against the City irrespective of whether it was of a burdensome character. Lack of precedent municipal authorization rendered the lease, as against the City, absolutely void and insusceptible of ratification.

This being true, the lease cannot properly be held to be binding on the City on the theory of *implied power* of the trustee to execute it, where, as here, the statutory plan requires express approval by designated municipal authorities and, in the interest of the public, prohibits the execution of leases for a period of more than 25 years.

There are, however, a number of additional reasons, why the decision of the Circuit Court of Appeals on this issue of the implied power of the trustee to bind the City is erroneous. These reasons are:

1. The City was denied any hearing whatever on the burdensome character of the lease, in violation of the Due Process clause of the Fifth Amendment.

2. The Circuit Court of Appeals held the lease to be enforceable against the City on the ground of res adjudicata and determined the binding effect of certain judgments *as a matter of law*. Under a long line of uniform Indiana decisions the question of res adjudicata is one of *fact*.

3. Although concededly the relevant trust documents contain no express authorization empowering the trustee to execute a long-term lease, the Circuit Court of Appeals held that such right did exist and completely ignored the established Indiana rule that grants by a municipality are to be strictly construed and that nothing passes by implication.

4. The Circuit Court of Appeals misconstrued and misinterpreted the trust instruments and ignored the factual background of the public charitable trust, both of which negative the existence of any implied power in the trustee to execute such a lease. The charitable trust was created for the purpose of establishing and maintaining competition with Indianapolis Gas and the execution of the 99 year lease was entirely antagonistic to the expressed purposes of the donors found in the trust instruments.

The propositions stated above are fully discussed in the City's original brief (under title "Due Process of Law," pages 32 to 43, inclusive, and under title "Lease Unenforceable Against City," pages 43 to 52, inclusive).

We will therefore here refer to them only briefly:

1. That the issue of the burdensome character of the lease was reserved for future determination by the court does not admit of substantial dispute. (II R. 321, 322, 475; III R. 1159, 1192; IV R. 1320.)

The City's counterclaim directly placed in issue the burdensome character of the lease, as an additional reason for its non-enforceability and specifically alleged the facts showing such burdensomeness. (I R. 136.)

The City had the right to rely on the reservation of the issue of burdensomeness and was under no obligation to offer proof on that issue and indeed would not have been permitted to do so.

Saunders v. Shaw et al., 244 U. S. 317, 320.

The City was thus denied due process of law.

Hovey v. Elliott, 167 U. S. 409, 417.

Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U. S. 292, 304-306;

Ohio Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 289.

The requirements of due process are not satisfied without an opportunity to be heard *on both questions of law and fact*.

Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679, 692.

Furthermore, the Circuit Court of Appeals held that

the question of whether the lease was prudent, i. e., burdensome, was urged before the Indiana Supreme Court and "that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460" (IV R. 1300).

The Circuit Court of Appeals also held that the cases relied upon by Chase in its complaint were res judicata "as to the validity of the 99 years lease" (IV R. 1300). Thus it was held that the reserved issue of the burdensome character of the lease was res adjudicata as against the City.

The burdensome character of the lease was specially pleaded by the City in a counterclaim (I R. 186). Chase for its answer to the City's counterclaim filed merely a general denial (I R. 214). While Chase pleaded in its complaint certain decisions as res adjudicata, it did not plead res judicata in its answer to the issue of burdensomeness raised by the City's counterclaim.

Despite the fact that no issue of res adjudicata was presented by Chase's answer to the City's counterclaim despite the reservation of the issue by the trial court, the Circuit Court of Appeals decided that the burdensome character of the lease was res adjudicata.

2. Under the uniform decisions of the highest courts of Indiana, the question of whether a former judgment was a complete adjudication of the issues involved in this case is a question of fact.

McSweeney v. Carney, 72 Ind. 430, 433.

The Circuit Court of Appeals held that the lease was enforceable against the City *if not burdensome* in char-

acter, but was unenforceable if burdensome. It then proceeded to determine that the question of the burdensomeness of the lease had been adjudicated, and denied the City any right to be heard on that issue. It thus deprived the City of rights guaranteed by the Fifth Amendment to the Federal Constitution.

Cf. *Cobbledick v. U. S.*, 309 U. S. 323, 325.

The hearing to which the City was entitled was a hearing in the trial court. Nothing short of that, will satisfy the requirements of due process.

The City by a timely petition for a rehearing emphasized this denial of due process and requested the Circuit Court of Appeals to reverse its decision and to remand the cause for a hearing on the issue of the burdensome character of the lease. (IV R. 1309, 1310, 1346.)

3. The Circuit Court of Appeals refused to follow an unbroken line of Indiana decisions to the effect that nothing passes by implication when a grant is made by a municipality—and it thus violated the rule laid down by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. Having determined that there was no express power granted to execute such a lease, the Circuit Court of Appeals should have held that inasmuch as the grant was from the City of Indianapolis, no power to execute such a lease could be implied.

The trial court found as a fact from the trust instruments in evidence that:

> "There is no provision in any of the trust instruments authorizing Citizens Gas Company to become lessee of a competing gas property." (Finding No. 20, III R. 1167.)

With this finding the Circuit Court of Appeals agreed. It said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers. This language imposes upon the trustee the duty 'to supply the City of Indianapolis and its inhabitants with light, heat and power.' Plainly the extent of the trustee's powers are measured by the scope of the duty imposed in the terms of the trust, and it is reasonable to conclude that the trustee had the power to secure what utility property was necessary or appropriate to enable it to engage in the gas business and to supply the City with light, heat and power."
>
> 113 F. (2d) 217, 227 (IV R. 1297.)

Yet the Circuit Court of Appeals held that:

> "We therefore conclude that the trustee had the power to make the long term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust res."
>
> 113 F. (2d) 217, 229 (IV R. 1300).

The trust instruments consisted of the franchise contract from the City to Citizens Gas (I R. 81) and the Articles of Incorporation of Citizens Gas (I R. 95).

The franchise contract designated the material provisions to be inserted in the Citizens Gas Articles of Incorporation. These material provisions thus became a condition to the grant and are to be construed strictly against the grantee.

In *Indianapolis Cable Railroad Co. v. Citizens Street Railroad Company* (1890), 127 Ind. 369, 390, it was said:

> "A grant made by the commonwealth, or by a municipal corporation, under authority from the commonwealth, is to be taken most strongly against the grantee, and nothing is to be taken by implication against the public, except what necessarily flows from the nature of the terms of the grant."

The same rule was announced by this court in *Piedmont Power & Light Co. v. Town of Graham, et al.*, 253 U. S. 193, 194, 195; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34; *Blair v. Chicago*, 201 U. S. 400, 471; and *Mitchell v. Dakota Central Telegraph Co.*, 246 U. S. 396, 412.

Under the above rule prevailing in Indiana and announced by this court, implied power in the trustee to make the lease should not be read into the trust instruments which admittedly are barren of any express power.

4. The entire historical background of the public charitable trust involved in this case and the terms of the trust instruments themselves, negative the idea of the right of the initial trustee to enter into a 99 year lease with Indianapolis Gas. Citizens Gas was organized to compete with Indianapolis Gas. Surely the settlors of the trust never contemplated a surrender of this competitive situation by agreement with Indianapolis Gas.

The lease requires rental to be paid until 2012 of sums equal to (1) 5% on the outstanding bonds (which now amount to $6,881,000); (2) 6% on the common stock of $2,000,000; (3) all taxes for which Indianapolis Gas would become liable including property and income taxes, state and federal; and (4) certain additional miscellaneous items

There is no provision for any adjustment of the lease rental due to economic or business conditions, or for any change based upon the earning power of invested capital. No matter how much taxes are increased, the burden falls always upon the lessee. There is not even a provision for a periodical adjustment of rental by agreement, or failing agreement, by arbitration.

Surely such a lease was not within the implied power of the trustee to execute.

VI.

THE CITY IS NOT ESTOPPED TO ASSERT THE UNENFORCEABILITY OF THE LEASE.

At pages 53 to 71, inclusive, of our original brief we pointed out that the doctrine of estoppel could not be successfully asserted against the City. The reasons for that conclusion may be thus briefly summarized:

1. There was no proof whatever that either Chase or any present bondholder of Indianapolis Gas even knew of, much less relied upon, any claimed act of estoppel. The Indiana rule is that the doctrine of estoppel has no application where the other party was not influenced by the acts claimed to result in such estoppel.

Ross et al. v. Banta (1894), 140 Ind. 120, 150;
Hosford v. Johnson (1881), 74 Ind. 479, 485.

2. The acts relied upon do not form the basis for an estoppel, nor has it been shown that any representative of the City ever asserted that the lease was enforceable against it.

3. A municipal corporation cannot, under the Indiana law, be estopped by the unauthorized acts of its officers.

Platter v. Board (1885), 103 Ind. 360, 381;

Cummins v. City of Seymour (1881), 79 Ind. 491, 496;

Lake County, etc., Co. v. Walsh (1902), 160 Ind. 32, 39.

In addition, the trial court found the facts respecting estoppel against Chase. (Findings No. 44, 45, III R. 1181; 46, 47, III R. 1182; 51, 54, III R. 1185; 58, III R. 1187.)

The third and fourth conclusions of law of the trial court were:

"3. That the City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

"4. That the Citizens Gas Company is not estopped by any of its conduct from denying the validity and enforceability against it of the lease." (III R. 1190.)

These findings are supported by ample evidence.

In *Guilford Const. Co. v. Biggs* (1939, C.C.A. 4) 102 F 2d, 46, 47, it was said:

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a) 28 U.S.C.A., following section 723 (c)) is but the formulation of a rule long recognized and applied by courts of equity."

This court said in *Adamson v. Gilliland* (1916), 242 U. S. 350, 353:

> "Considering that a patent has been granted to the plaintiff, the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis v. Schwartz*, 155 U. S. 631, 636."

In the instant case there is ample evidence consistent with the findings of the trial court. Its findings under the above rules are unassailable.

VII.

ALL CONTESTED ISSUES FOUND AGAINST CHASE AND INDIANAPOLIS GAS BY TRIAL COURT.

As pointed out, the trial court found the facts specially. On every contested issue, the findings were against Chase and Indianapolis Gas.

Despite the findings of the trial court both Chase and Indianapolis Gas have presented this case to the Circuit Court of Appeals and to this court as though there were no findings of the trial court against them.

Each finding of the trial court is amply supported by competent and relevant evidence. The findings of the trial court thus supported are unassailable.

VIII.

WILLIAMS CASE DOES NOT STATE APPLICABLE INDIANA LAW.

The case of *Williams v. Citizens Gas Co., et al.* (206 Ind. 448) is not res judicata of the issues present here for reasons pointed out in our original brief at pages 75 to 79.

Nor does the Williams case express the Indiana law applicable to the issues here. The Williams case was decided on a demurrer. The Indiana Supreme Court passed on only those facts pleaded in the complaint.

The nature of the Williams case is stated by the Indiana Supreme Court to be a "Suit by appellant (Williams) to establish a trust; to quiet title to property of the trust estate; to recover diverted assets of the trust estate; to recapture the trust and its property from delinquent and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries."

Thus it is apparent that the cause of action in the Williams case is different from the cause of action here. Hence it follows that an issue not actually litigated in the Williams case is not res adjudicata.

The validity of the 99 year lease against the City as successor trustee was not actually litigated in the Williams case; thus, is not res judicata.

IX.

INDIANAPOLIS GAS SHOULD HAVE BEEN REALIGNED AS A PLAINTIFF AND THUS JURISDICTION OF THE LOWER COURT DESTROYED.

We have fully discussed this proposition at pages 22 to 32 of our original brief.

Chase and Indianapolis Gas both actively urge the enforceability of the lease against the City. The City denies this claim. Unless and until the lease is held binding upon the City, neither Chase nor Indianapolis Gas can obtain any relief whatever against the City under the terms of the lease.

This is the real, the main and the controlling controversy in this case. The attitude of the parties in respect of this controversy (and not in respect of subsidiary or dependent issues) should determine whether realignment is required.

Sutton v. English, 246 U. S. 199, 204, 62 L. Ed. 664.

This record shows (see our original brief, page 26) that as a practical proposition Indianapolis Gas is *completely insulated* from paying the judgment of more than a million dollars rendered against it in favor of Chase. It taxes one's credulity to believe that Chase and Indianapolis Gas are hostile litigants, when Indianapolis Gas in all courts in which this case has been heard has readily admitted that the judgment against it for the principal sum is correct and did not even ask this court to review such judgment. The original alignment of Indianapolis Gas was based on no reality of conflict with Chase on the dominant issue in this case, viz: the enforceability of the 99 year lease against the City.

X.

FISHBACK CASE NOT RES JUDICATA

The case of *Fishback v. Public Service Commission* (193 Ind. 282), pleaded by Chase to be res judicata (I R. 10, 13) and relied on by the Circuit Court of Appeals as a barrier to the City's contentions (IV R. 1300), in reality determined only that the attempted appeal was not taken in time. The case was dismissed as to the City before judgment in the trial court. In speaking of the order of the Public Service Commission, also pleaded by Chase as res judicata of the validity of the lease (I R. 8, 18), the court said (page 285):

> "The approval of a lease of the property of one public utility corporation by another is a legislative act . . ."

It is not a judicial act. Being merely legislative in character it could not be res judicata.

XI.

We deem it unnecessary to discuss the other questions presented in our original briefs, as this memorandum is intended merely to supplement such briefs.

The City submits that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A.

Chapter 129, Acts 1905 (Pg. 271)

Sec. 85. "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302) of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

APPENDIX B.

Chapter 129, Acts 1905 (Pg. 396)

Sec. 254. "Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."